

1-1 By: Madden (Senate Sponsor - Whitmire) H.B. No. 3228  
1-2 (In the Senate - Received from the House May 5, 2009;  
1-3 May 6, 2009, read first time and referred to Committee on Criminal  
1-4 Justice; May 23, 2009, reported adversely, with favorable  
1-5 Committee Substitute by the following vote: Yeas 6, Nays 0;  
1-6 May 23, 2009, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 3228 By: Whitmire

1-8 A BILL TO BE ENTITLED  
1-9 AN ACT

1-10 relating to the offense of prohibited substances and items in  
1-11 correctional facilities.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Section 38.11, Penal Code, as amended by  
1-14 Chapters 949 (H.B. 1575) and 1092 (H.B. 2077), Acts of the 79th  
1-15 Legislature, Regular Session, 2005, is reenacted and amended to  
1-16 read as follows:

1-17 Sec. 38.11. PROHIBITED SUBSTANCES AND ITEMS IN [~~ADULT OR~~  
1-18 ~~JUVENILE~~] CORRECTIONAL [~~OR DETENTION~~] FACILITY [~~OR ON PROPERTY OF~~  
1-19 ~~TEXAS DEPARTMENT OF CRIMINAL JUSTICE OR TEXAS YOUTH COMMISSION~~].

1-20 (a) A person commits an offense if the person provides, or  
1-21 possesses with the intent to provide:

1-22 (1) an alcoholic beverage, controlled substance, or  
1-23 dangerous drug to [~~an inmate of a correctional facility or to~~] a  
1-24 person in the custody of a [~~secure~~] correctional facility [~~or~~  
1-25 ~~secure detention facility for juveniles~~], except on the  
1-26 prescription of a [~~physician or~~] practitioner[, ~~as defined in~~  
1-27 ~~Section 551.003, Occupations Code~~];

1-28 (2) a deadly weapon to [~~an inmate of a correctional~~  
1-29 ~~facility or to~~] a person in the custody of a [~~secure~~] correctional  
1-30 facility [~~or secure detention facility for juveniles~~];

1-31 (3) a cellular telephone or other wireless  
1-32 communications device or a component of one of those devices [~~,~~  
1-33 ~~cigarette, tobacco product, or money~~] to a person in the custody [~~an~~  
1-34 ~~inmate~~] of a correctional facility [~~operated by or under contract~~  
1-35 ~~with the Texas Department of Criminal Justice or to a person in the~~  
1-36 ~~custody of a secure correctional facility or secure detention~~  
1-37 ~~facility for juveniles, except for money that is provided for the~~  
1-38 ~~benefit of the juvenile in accordance with facility rules~~];

1-39 (4) [~~a cellular telephone or~~] money to a person  
1-40 confined in a correctional facility [~~local jail regulated by the~~  
1-41 ~~Commission on Jail Standards~~]; or

1-42 (5) a cigarette or tobacco product to a person  
1-43 confined in a correctional facility, except that if the facility is  
1-44 a local jail regulated by the Commission on Jail Standards, the  
1-45 person commits an offense only if [~~and in~~] providing the cigarette  
1-46 or tobacco product [~~the person~~] violates a rule or regulation  
1-47 adopted by the sheriff or jail administrator that:

1-48 (A) prohibits the possession of a cigarette or  
1-49 tobacco product by a person [~~an inmate~~] confined in the jail; or

1-50 (B) places restrictions on:

1-51 (i) the possession of a cigarette or  
1-52 tobacco product by a person [~~an inmate~~] confined in the jail; or

1-53 (ii) the manner in which a cigarette or  
1-54 tobacco product may be provided to a person [~~an inmate~~] confined in  
1-55 the jail.

1-56 (b) A person commits an offense if the person takes an  
1-57 alcoholic beverage, controlled substance, or dangerous drug into a  
1-58 correctional facility [~~or a secure correctional facility or secure~~  
1-59 ~~detention facility for juveniles, except for delivery to a facility~~  
1-60 ~~warehouse, pharmacy, or physician~~].

1-61 (c) A person commits an offense if the person takes a  
1-62 controlled substance or dangerous drug on property owned, used, or  
1-63 controlled by a correctional facility [~~the Texas Department of~~

2-1 ~~Criminal Justice, the Texas Youth Commission, or a secure~~  
2-2 ~~correctional facility or secure detention facility for juveniles,~~  
2-3 ~~except for delivery to a warehouse, pharmacy, or physician on~~  
2-4 ~~property owned, used, or controlled by the department, the~~  
2-5 ~~commission, or the facility].~~

2-6 (d) A person commits an offense if the person:  
2-7 (1) possesses a controlled substance or dangerous drug  
2-8 while in a correctional facility or [+

2-9 ~~[(A)] on property owned, used, or controlled by~~  
2-10 ~~[the Texas Department of Criminal Justice, the Texas Youth~~  
2-11 ~~Commission, or] a [secure] correctional facility [or secure~~  
2-12 ~~detention facility for juveniles; or~~

2-13 ~~[(B) in a correctional facility or a secure~~  
2-14 ~~correctional facility or secure detention facility for juveniles];~~  
2-15 or

2-16 (2) possesses a deadly weapon while in a correctional  
2-17 facility ~~[or in a secure correctional facility or secure detention~~  
2-18 ~~facility for juveniles].~~

2-19 (e) It is an affirmative defense to prosecution under  
2-20 Subsection (b), (c), or (d)(1) ~~[of this section]~~ that the person  
2-21 possessed the alcoholic beverage, controlled substance, or  
2-22 dangerous drug pursuant to a prescription issued by a practitioner  
2-23 or while delivering the beverage, substance, or drug to a  
2-24 warehouse, pharmacy, or practitioner ~~[physician]~~ on property  
2-25 owned, used, or controlled by the ~~[department, the Texas Youth~~  
2-26 ~~Commission, or by the operator of a secure]~~ correctional facility  
2-27 ~~[or secure detention facility for juveniles].~~ It is an affirmative  
2-28 defense to prosecution under Subsection (d)(2) ~~[of this section]~~  
2-29 that the person possessing the deadly weapon is a peace officer or  
2-30 is an officer or employee of the correctional facility who is  
2-31 authorized to possess the deadly weapon while on duty or traveling  
2-32 to or from the person's place of assignment.

2-33 (f) In this section:

2-34 (1) "Practitioner" has the meaning assigned by Section  
2-35 481.002, Health and Safety Code.

2-36 (2) "Prescription" has the meaning assigned by Section  
2-37 481.002, Health and Safety Code.

2-38 (3) "Cigarette" has the meaning assigned by Section  
2-39 154.001, Tax Code.

2-40 (4) "Tobacco product" has the meaning assigned by  
2-41 Section 155.001, Tax Code.

2-42 (5) "Component" means any item necessary for the  
2-43 current, ongoing, or future operation of a cellular telephone or  
2-44 other wireless communications device, including a subscriber  
2-45 identity module card or functionally equivalent portable memory  
2-46 chip, a battery or battery charger, and any number of minutes that  
2-47 have been purchased or for which a contract has been entered into  
2-48 and during which a cellular telephone or other wireless  
2-49 communications device is capable of transmitting or receiving  
2-50 communications.

2-51 (6) "Correctional facility" means:

2-52 (A) any place described by Section  
2-53 1.07(a)(14)(A), (B), or (C); or

2-54 (B) a secure correctional facility or secure  
2-55 detention facility, as defined ["Secure correctional facility" and  
2-56 "secure detention facility" have the meanings assigned] by Section  
2-57 51.02, Family Code.

2-58 (g) An offense under this section is a felony of the third  
2-59 degree.

2-60 (h) Notwithstanding Section 15.01(d), if a person commits  
2-61 the offense of criminal attempt to commit an offense under  
2-62 Subsection (a), ~~[or] (b), or (c),~~ the offense committed under  
2-63 Section 15.01 is a felony of the third degree.

2-64 (i) It is an affirmative defense to prosecution under  
2-65 Subsection (b) that the actor:

2-66 (1) is a duly authorized member of the clergy with  
2-67 rights and privileges granted by an ordaining authority that  
2-68 includes administration of a religious ritual or ceremony requiring  
2-69 the presence or consumption of an alcoholic beverage; and

3-1 (2) takes four ounces or less of an alcoholic beverage  
3-2 into the correctional facility [~~or the secure correctional facility~~  
3-3 ~~or secure detention facility for juveniles~~] and personally consumes  
3-4 all of the alcoholic beverage or departs from the facility with any  
3-5 portion of the beverage not consumed.

3-6 (j) A person commits an offense if the person, while  
3-7 confined in [an inmate of] a correctional facility, [~~operated by or~~  
3-8 ~~under contract with the Texas Department of Criminal Justice or~~  
3-9 ~~while in the custody of a secure correctional facility or secure~~  
3-10 ~~detention facility for juveniles~~] possesses a cellular telephone or  
3-11 other wireless communications device or a component of one of those  
3-12 devices.

3-13 (k) A person commits an offense if, with the intent to  
3-14 provide to or make a cellular telephone or other wireless  
3-15 communications device or a component of one of those devices  
3-16 available for use by a person in the custody of a correctional  
3-17 facility, the person:

3-18 (1) acquires a cellular telephone or other wireless  
3-19 communications device or a component of one of those devices to be  
3-20 delivered to the person in custody;

3-21 (2) provides a cellular telephone or other wireless  
3-22 communications device or a component of one of those devices to  
3-23 another person for delivery to the person in custody; or

3-24 (3) makes a payment to a communication common carrier,  
3-25 as defined by Article 18.20, Code of Criminal Procedure, or to any  
3-26 communication service that provides to its users the ability to  
3-27 send or receive wire or electronic communications.

3-28 SECTION 2. The heading to Article 18.20, Code of Criminal  
3-29 Procedure, is amended to read as follows:

3-30 Art. 18.20. DETECTION, INTERCEPTION, AND USE OF WIRE, ORAL,  
3-31 OR ELECTRONIC COMMUNICATIONS.

3-32 SECTION 3. Section 4, Article 18.20, Code of Criminal  
3-33 Procedure, is amended to read as follows:

3-34 Sec. 4. OFFENSES FOR WHICH INTERCEPTIONS MAY BE  
3-35 AUTHORIZED. A judge of competent jurisdiction may issue an order  
3-36 authorizing interception of wire, oral, or electronic  
3-37 communications only if the prosecutor applying for the order shows  
3-38 probable cause to believe that the interception will provide  
3-39 evidence of the commission of:

3-40 (1) a felony under Section 19.02, 19.03, or 43.26,  
3-41 Penal Code;

3-42 (2) a felony under:  
3-43 (A) Chapter 481, Health and Safety Code, other  
3-44 than felony possession of marihuana;

3-45 (B) Section 485.032 [~~485.033~~], Health and Safety  
3-46 Code; or

3-47 (C) Chapter 483, Health and Safety Code;

3-48 (3) an offense under Section 20.03 or 20.04, Penal  
3-49 Code;

3-50 (4) an offense under Chapter 20A, Penal Code;

3-51 (5) an offense under Chapter 34, Penal Code, if the  
3-52 criminal activity giving rise to the proceeds involves the  
3-53 commission of an offense under Title 5, Penal Code, or an offense  
3-54 under federal law or the laws of another state containing elements  
3-55 that are substantially similar to the elements of an offense under  
3-56 Title 5; [~~or~~]

3-57 (6) an offense under Section 38.11, Penal Code; or

3-58 (7) an attempt, conspiracy, or solicitation to commit  
3-59 an offense listed in this section.

3-60 SECTION 4. Section 5, Article 18.20, Code of Criminal  
3-61 Procedure, is amended by amending Subsection (a) and adding  
3-62 Subsections (c) and (d) to read as follows:

3-63 (a) Except as otherwise provided by this section and  
3-64 Sections [Section] 8A and 8B, only the Department of Public Safety  
3-65 is authorized by this article to own, possess, install, operate, or  
3-66 monitor an electronic, mechanical, or other device. The Department  
3-67 of Public Safety may be assisted by an investigative or law  
3-68 enforcement officer or other person in the operation and monitoring  
3-69 of an interception of wire, oral, or electronic communications,

4-1 provided that the officer or other person:  
4-2 (1) is designated by the director for that purpose;  
4-3 and

4-4 (2) acts in the presence and under the direction of a  
4-5 commissioned officer of the Department of Public Safety.

4-6 (c) The Texas Department of Criminal Justice may own  
4-7 electronic, mechanical, or other devices for a use or purpose  
4-8 authorized by Section 500.008, Government Code, and the inspector  
4-9 general of the Texas Department of Criminal Justice, a commissioned  
4-10 officer of that office, or another person acting in the presence and  
4-11 under the direction of a commissioned officer of that office may  
4-12 possess, install, operate, or monitor those devices as provided by  
4-13 Section 500.008.

4-14 (d) The Texas Youth Commission may own electronic,  
4-15 mechanical, or other devices for a use or purpose authorized by  
4-16 Section 61.0455, Human Resources Code, and the inspector general of  
4-17 the Texas Youth Commission, a commissioned officer of that office,  
4-18 or another person acting in the presence and under the direction of  
4-19 a commissioned officer of that office may possess, install,  
4-20 operate, or monitor those devices as provided by Section 61.0455.

4-21 SECTION 5. Article 18.20, Code of Criminal Procedure, is  
4-22 amended by adding Section 8B to read as follows:

4-23 Sec. 8B. DETECTION OF CELLULAR TELEPHONE OR OTHER WIRELESS  
4-24 COMMUNICATIONS DEVICE IN CORRECTIONAL OR DETENTION FACILITY. (a)  
4-25 In this section, "correctional facility" has the meaning assigned  
4-26 by Section 39.04(e), Penal Code.

4-27 (b) Notwithstanding any other provision of this article or  
4-28 Article 18.21, the office of the inspector general of the Texas  
4-29 Department of Criminal Justice may:

4-30 (1) without a warrant, use electronic, mechanical, or  
4-31 other devices to detect the presence or use of a cellular telephone  
4-32 or other wireless communications device in a correctional facility;

4-33 (2) without a warrant, intercept, monitor, detect, or,  
4-34 as authorized by applicable federal laws and regulations, prevent  
4-35 the transmission of any communication transmitted through the use  
4-36 of a cellular telephone or other wireless communications device in  
4-37 a correctional facility; and

4-38 (3) use, to the extent authorized by law, any  
4-39 information obtained under Subdivision (2), including the contents  
4-40 of an intercepted communication, in any criminal or civil  
4-41 proceeding before a court or other governmental agency or entity.

4-42 (c) Not later than the 30th day after the date on which the  
4-43 office of the inspector general uses an electronic, mechanical, or  
4-44 other device under Subsection (b), the inspector general shall  
4-45 report the use of the device to:

4-46 (1) a prosecutor with jurisdiction in the county in  
4-47 which the device was used; or

4-48 (2) the special prosecution unit established under  
4-49 Subchapter E, Chapter 41, Government Code, if that unit has  
4-50 jurisdiction in the county in which the device was used.

4-51 (d) When using an electronic, mechanical, or other device  
4-52 under Subsection (b), the office of the inspector general shall  
4-53 minimize the impact of the device on any communication that is not  
4-54 reasonably related to the detection of the presence or use of a  
4-55 cellular telephone or other wireless communications device in a  
4-56 correctional facility.

4-57 (e) A person confined in a correctional facility does not  
4-58 have an expectation of privacy with respect to the possession or use  
4-59 of a cellular telephone or other wireless communications device  
4-60 located on the premises of the facility. The person who is  
4-61 confined, and any person with whom that person communicates through  
4-62 the use of a cellular telephone or other wireless communications  
4-63 device, does not have an expectation of privacy with respect to the  
4-64 contents of any communication transmitted by the cellular telephone  
4-65 or wireless communications device.

4-66 SECTION 6. Section 17, Article 18.20, Code of Criminal  
4-67 Procedure, is amended to read as follows:

4-68 Sec. 17. NONAPPLICABILITY. This article does not apply to  
4-69 conduct described as an affirmative defense under Section 16.02(c),

5-1 Penal Code, except as otherwise specifically provided by that  
5-2 section.

5-3 SECTION 7. Chapter 500, Government Code, is amended by  
5-4 adding Section 500.008 to read as follows:

5-5 Sec. 500.008. DETECTION AND MONITORING OF CELLULAR  
5-6 TELEPHONES. (a) The department may own and the office of inspector  
5-7 general may possess, install, operate, or monitor an electronic,  
5-8 mechanical, or other device, as defined by Article 18.20, Code of  
5-9 Criminal Procedure.

5-10 (b) The inspector general shall designate in writing the  
5-11 commissioned officers of the office of inspector general who are  
5-12 authorized to possess, install, operate, and monitor electronic,  
5-13 mechanical, or other devices for the department.

5-14 (c) An investigative or law enforcement officer or other  
5-15 person, on request of the office of inspector general, may assist  
5-16 the office in the operation and monitoring of an interception of  
5-17 wire, oral, or electronic communications if the investigative or  
5-18 law enforcement officer or other person:

5-19 (1) is designated by the executive director for that  
5-20 purpose; and

5-21 (2) acts in the presence and under the direction of a  
5-22 commissioned officer of the inspector general.

5-23 SECTION 8. Subchapter C, Chapter 61, Human Resources Code,  
5-24 is amended by adding Section 61.0455 to read as follows:

5-25 Sec. 61.0455. DETECTION AND MONITORING OF CELLULAR  
5-26 TELEPHONES. (a) The commission may own and the office of the  
5-27 inspector general may possess, install, operate, or monitor an  
5-28 electronic, mechanical, or other device, as defined by Article  
5-29 18.20, Code of Criminal Procedure.

5-30 (b) The inspector general shall designate in writing the  
5-31 commissioned officers of the office of inspector general who are  
5-32 authorized to possess, install, operate, and monitor electronic,  
5-33 mechanical, or other devices for the commission.

5-34 (c) An investigative or law enforcement officer or other  
5-35 person, on request of the office of inspector general, may assist  
5-36 the office in the operation and monitoring of an interception of  
5-37 wire, oral, or electronic communications if the investigative or  
5-38 law enforcement officer or other person:

5-39 (1) is designated by the executive commissioner for  
5-40 that purpose; and

5-41 (2) acts in the presence and under the direction of a  
5-42 commissioned officer of the inspector general.

5-43 SECTION 9. Section 16.02, Penal Code, is amended by adding  
5-44 Subsection (e-1) to read as follows:

5-45 (e-1) It is a defense to prosecution under Subsection (d)(1)  
5-46 that the electronic, mechanical, or other device is possessed by a  
5-47 person authorized to possess the device under Section 500.008,  
5-48 Government Code, or Section 61.0455, Human Resources Code.

5-49 SECTION 10. The changes in law made by this Act with respect  
5-50 to Sections 16.02 and 38.11, Penal Code, apply only to an offense  
5-51 committed on or after the effective date of this Act. An offense  
5-52 committed before the effective date of this Act is governed by the  
5-53 law in effect when the offense was committed, and the former law is  
5-54 continued in effect for that purpose. For purposes of this section,  
5-55 an offense was committed before the effective date of this Act if  
5-56 any element of the offense occurred before that date.

5-57 SECTION 11. This Act takes effect September 1, 2009.

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5-58